Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-1308

RICARDO WOODS and ROLAND REAVES,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Now comes the State of Ohio, Respondent, by Simon L. Leis, Jr., Prosecuting Attorney, Fred J. Cartolano, First Assistant Prosecuting Attorney, Leonard Kirschner, Assistant Prosecuting Attorney and Robert R. Hastings, Jr., Assistant Prosecuting Attorney, and do hereby object to the American Civil Liberties Union filing an Amicus Curiae brief in this matter.

Counsel for the respondent do hereby submit that Amicus Curiae in this case has endeavored to circumvent the rules of this Court requiring leave to be first granted before the Brief is filed by the devious means of attaching said brief to their Motion for Leave.

The decision upon which Certiorari was filed was initially rendered by the Supreme Court of Ohio on or about December 1, 1976. Counsel for the Petitioner in this case filed his Petition for Writ of Certiorari on or about March 21, 1977. The Amicus in this matter was well aware of the progress and status of the case; but delayed filing any Motion in this Court until approximately three weeks after the original Petition had been filed and after the Respondent's brief had been completed and at the printers for printing and submission to this Court. We therefore submit that under the circumstances the filing of the Brief of Amicus Curiae at this stage of the proceeding is not timely.

We further submit that the Motion for Leave to File the Brief of Amicus Curiae has not complied with Rule 42 (3) of this Court which provides:

> ". . . It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case . . . ."

We respectfully submit that counsel for Amicus Curiae has failed to set forth any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties.

We further submit that counsel for the petitioners is a knowledgeable, seasoned practicing criminal lawyer with over 25 years of practice before the bar of the State of Ohio. He has recently been one of the members of a special commission appointed by the Supreme Court of Ohio in the drafting of the new Ohio Rules of Criminal Procedure. He is currently, and has been for a number of

years, Professor of Criminal Law at Salmon P. Chase College of Law. He also has authored one of the two basic texts and annotations on criminal law and procedure under the new criminal code in Ohio.

We submit this background of counsel for the petitioners to the Court because we believe that there is no reason for Amicus Curiae briefs where petitioners are represented by capable, competent legal counsel. This is especially true where it appears that counsel for the Amicus Curiae has not set forth any facts or questions of law that have not been raised or adequately presented by petitioners' counsel.

CONCLUSION

In conclusion we object to the American Civil Liberties Union filing a Brief of Amicus Curiae for any one or all of the hereinafter stated reasons:

1. They are endeavoring to file a brief by means of attaching it to a Motion for Leave;
2. They have filed their Motion and Brief more than three weeks after the Petition for Certiorari was filed and after Respondent's brief was at the printers, even though over three months had passed in which amicus could have prepared a motion.
3. The petitioners are represented by capable counsel.
4. They have failed to set forth in accordance with Rule 42 (3) any facts or questions of law that have not been raised or adequately presented by petitioners' counsel.

5. A Motion to file a brief by Amicus Curiae on a Petition for Certiorari is not favored (Rule 42 (1)).

Respectfully submitted,

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Assistant Prosecuting Attorney

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Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO BRIEF OF AMICUS CURIAE

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REPLY BRIEF OF RESPONDENT IN OPPOSITION TO BRIEF OF AMICUS CURIAE

QUESTIONS PRESENTED

The following questions are presented in Amicus Curiae Brief. It is to be noted that questions II through IV were not raised or preserved by Petitioners below and that Petitioners have not raised question V in their Petition for Writ of Certiorari. Petitioner Reaves has never raised any evidentiary issue in the state Courts.

(1) Whether Ohio Revised Code 2929.04 (B), as construed and applied by the Ohio Supreme Court, imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

(2) Whether Ohio Revised Code 2929.03 (C) violates the right to trial by jury guaranteed by the Sixth and

Fourteenth Amendments and imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by precluding any jury input as to the existence of mitigating factors and the appropriateness of the death penalty?

(3) Whether Ohio Revised Code 2929.03 (E) and 2929.04 (B) violate the due process clause of the Fourteenth Amendment by placing on the defendant the burden of proving by a preponderance of the evidence that mitigating factors exist and that he should therefore not be executed?

(4) Whether the scope of review accorded death sentences by the Ohio Supreme Court is adequate, under the Eighth and Fourteenth Amendments, to insure that a death sentence is warranted by the facts of a particular case and is proportionate to sentences imposed in similar cases?

(5) Whether the Ohio Supreme Court unforseeably interpreted and applied Ohio's law of attempt, in violation of the due process clause of the Fourteenth Amendment, when it held that "casing" the scene of a projected robbery and lying in wait for the prospective victim were encompassed by Ohio Rev. Code 2923.02 (A) which defines an act of attempt as "conduct which, if successful, would constitute or result in" robbery?

INTRODUCTORY STATEMENT

Roland Reaves and Ricardo Woods, Petitioners herein, planned a robbery during the afternoon of July 16, 1974. To help accomplish that purpose they purchased a .38 caliber revolver from a friend. At approximately midnight they drove Reaves' car to Copelen Street where they parked. As they approached the United Dairy Farmer store they were armed with the .38 caliber revolver and a .22 caliber handgun.

Petitioners then began to "case" the store which was located on Florence Avenue. As they were doing this the acting manager of the store was inside ringing out the cash registers for the day and preparing to make a nightly bank deposit which totaled over $2,000 on that particular night. While they stood outside the store Petitioners observed the manager indicate to two other men that the store was closed. Petitioner Woods then stood by a bus stop across the street from the store while Petitioner Reaves climbed onto the roof of the one-story store.

Shortly after midnight on July 17, 1974, the Cincinnati Police received a telephone call from a woman who said that she had seen a man on the roof of the United Dairy Farmers store on Florence Avenue. That information was broadcast to patrol cars in the area and several officers responded. One of the officers, Patrolman Kramer observed the Petitioners looking over their shoulders while walking on Florence Avenue in the vicinity of the store, and he reported that information over the police radio. Another officer, Patrolman David Cole, also responded to the broadcast and was approaching the scene along Florence Avenue.

As Patrolman Cole observed the Petitioners he jammed on the brakes of his police cruiser and skidded to a stop next to the curb. Patrolman Cole started to get out of his

cruiser when Petitioner Woods stuck his head through the passenger window to talk to the officer. As Petitioner Woods did this Patrolman Cole exited from the cruiser and moved toward the rear of the cruiser. Just as Petitioner Woods pulled his head out of the window to see where Patrolman Cole had gone Petitioner Reaves started firing his weapon. The first bullet struck Patrolman Cole in the chest. Petitioner Reaves continued firing three or four shots in all.

Petitioner Woods fired his .22 caliber pistol at Patrolman Cole, striking him in the back, as Petitioners started running away. As they ran down the street Patrolman Cole, lying bleeding on the ground, fired three shots at them.

Patrolman Cole was pronounced dead on arrival at the hospital, and the subsequent autopsy and ballistics examination disclosed that he had been shot by both a .22 and a .38 caliber weapon.

Petitioner Reaves was arrested on July 18th, 1974, in Cincinnati, Ohio and subsequently made statements to investigating officers which implicated Petitioner Woods. Petitioner Woods was arrested on July 19th, 1974, in West Virginia at the home of his mother. After the arrival of Cincinnati police, Petitioner Woods made a complete statement as to his part in the events leading up to and following the homicide.

As was pointed out in Respondent's Brief in Opposition to the Petition for Writ of Certiorari in response to *Furman* v. *Georgia*, 408 U.S. 238 (1977) the Ohio legislature enacted Sections 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code.

Those sections provide for a bifurcated trial in a capital case. Capital cases in Ohio are limited to cases involving aggravated murder accompanied by a specific statutory aggravating circumstance. Both the charge of aggravated

murder and the specification must be proved beyond a reasonable doubt. If both have been proved then the trial court or three-judge panel acts as the sentencer. Before a death sentence may be imposed there must be a unanimous finding that none of the statutory mitigating circumstances have been established by a preponderance of the evidence.

ARGUMENT

I.

In considering mitigating factors the sentencer is to take into consideration the nature and circumstances of the offense and the history, character, and condition of the defendant. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed narrowly and that relevant factors, such as prior criminal record and the age of the defendant, are to be considered by the sentencing authority, *State* v. *Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods*, 48 Ohio St. 2d 127, 133-138 (1976); and *State* v. *Osborne*, 49 Ohio St. 2d 135, 145-147.

Contrary to Amicus' assertion that the mitigating factor contained in Section 2929.04 (B) (1) is limited to mercy killing, the Respondent asserts it could apply in cases where the course of conduct engaged in by the defendant fell short of self-defense; where during the perpetration of a felony a co-defendant is killed; and where the victim is masochistic in nature in a death which results from a physical beating. The Supreme Court of Ohio reviewed

the record in *State* v. *Bates,* 48 Ohio St. 325 (1976) to determine if sufficient evidence existed to establish the mitigating factor as set forth in Section 2929.04 (B) (1).

The mitigation standards set forth in the Ohio Revised Code are no different than those found in the Model Penal Code or the Florida statutes. And they are no more narrow than the questions the jury must answer in Texas before the death penalty can be imposed, *Jurek* v. *Texas,* — U.S. —, 96 S. Ct. 2950, 2955 (1976). In fact, this Court held that Georgia's statutory scheme which provides for the death penalty passed constitutional muster despite the fact that no mitigating circumstances are defined by statute. Thus, in Georgia the scope of the nonstatutory mitigating circumstances are not delineated by statute. The defendant is afforded substantial latitude as to the types of evidence that he introduces.

It is submitted that Ohio's mitigating circumstances provide standards which channel and guide the discretion of the sentencing authority so as to avoid arbitrary and capricious imposition of the death penalty.

II.

As was pointed out in Respondent's Brief in Opposition the issue of exclusion of the jury in the sentencing process in a capital case was not raised or preserved below.

This Court has never suggested that jury sentencing is constitutionally required. In *Proffitt* v. *Florida,* — U.S. —, 96 S. Ct. 2960 (1976) this Court upheld Florida's statutory scheme which provides only for an advisory jury verdict in the sentencing process.

It is submitted that judicial sentencing does not deprive a defendant of any constitutional right. A system of judicial sentencing should lead to greater consistency in the

imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman* v. *Georgia,* supra, the Supreme Court of Ohio held that there is no constitutional provision prohibiting a three-judge panel from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State* v. *Ferguson,* 175 Ohio St. 390, 396 (1964) and *State* v. *Frohner,* 150 Ohio St. 53 (1948). This Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha* v. *California,* 402 U.S. 183 (1971). It is submitted that the imposition of sentence by a three-judge panel or trial court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

III.

Again, this issue of allocating the burden of proof to the defendant during the mitigation here, was not raised or preserved by the Petitioners in the trial courts.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defense which the defense must bear the burden of going forward with evidence upon in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present

evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights, *State* v. *Lockett*, 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove guilt beyond a reasonable doubt. Ohio statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon*, 343 U.S. 790 (1952).

IV.

Like the previous two issues the issue of sufficiency of appellate review was not raised or preserved in the State Courts. Over three months elapsed from the time this Court rendered its decisions on July 2, 1976 and the time Petitioners' cases were argued before the Supreme Court of Ohio. Nevertheless, no challenge to the Ohio capital punishment system was made based on the grounds set forth in the questions II, III, and IV of the Amicus Brief.

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure

and Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the even-handed, rational and consistent imposition of the death sentences under law. *Jurek* v. *Texas*, — U.S. —, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller*, 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless*, 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne*, 49 Ohio St. 2d 135, 146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioners' assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State* v. *Edwards*, 49 Ohio St. 2d 31, 47 (1976), the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered whether it be the verdict on the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

V.

Amicus has raised an issue that has never been raised by Petitioner, that is, the retroactive application of the Ohio law on attempt. Petitioner Woods did raise the issue of whether there had been an attempt established by the evidence. That issue, however, has been abandoned by Petitioner Woods in his Petition for Writ of Certiorari. Petitioner Reaves has never challenged the evidentiary sufficiency of his conviction. In accordance with *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), Respondent submits it would be improvident to grant certiorari on an issue raised before this court for the first time.

The Ohio statute on attempt, Section 2923.02 (A) of the Ohio Revised Code, was enacted on January 1, 1974, one full half year before the crime in this case was perpetrated.

Petitioners drove to the crime scene in Petitioner Reaves' car which they parked on an adjacent street. When they heard what they thought was police sirens they started walking away from the direction of their automobile and down Florence Avenue.

The Supreme Court of Ohio has construed Section 2923.-02 (A) to be consistent with Section 5.01 of the Model Penal Code which sets forth the "substantial step" test.

CONCLUSION

For the reasons set forth above it is respectfully submitted this Court should deny Petitioners' Petition for Writ of Certiorari.

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